United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1272

To be argued by
BARRY BASSIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

CELEDONIA MORALES,

Appellant.

Docket No. 77-1272

B P/S

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

BRIEF FOR APPELLANT CELEDONIA MORALES

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- CELEDONIA MORALES, Defendant-Appellant.	Docket No. 77-1272

BRIEF FOR APPELLANT CELEDONIA MORALES

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether appellant was deprived of a fair trial by the court's erroneous instructions on conscious avoidance of knowledge and on the fabrication of a false document.

2. Whether as a result of the defense attorney's conflict of interest and his ignorance of the federal criminal law, appellant was deprived of the effective assistance of counsel.

3. Whether the imposition of a harsh twelve year term of incarceration plus a special parole term of ten years was based upon material false assumptions concerning appellant.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Thomas C. Platt) rendered on May 20, 1977, after a jury trial, convicting appellant of a single count of unlawful possession of heroin with intent to distribute (21 U.S.C. §841(a)(1), 18 U.S.C. §2). Appellant was sentenced to a 12 year term of imprisonment (under which she may become eligible for parole when the Parole Commission so determines, pursuant to 18 U.S.C. §4205 (b)(2)). The court also imposed a special parole term of 10 years. Execution of sentence was stayed pending the determination of this appeal.

By order of this Court, dated June 22, 1977, The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Celedonia Morales and Anna Mendez were charged in a single-count indictment (77 Cr. 121)* with the crime of knowingly and unlawfully possessing with intent to distribute

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*The indictment is B to the separate appendix to appellant's brief.

approximately two pounds of heroin. The case was severed for the purpose of trial and the issue at appellant Morales' trial was whether she knew that she possessed heroin at the time of her arrest.

A. The Events

On February 25, 1977, at about 8:20 a.m. a man and woman (allegedly appellant Morales) approached the American Airlines ticket counter at O'Hare Airport in Chicago (80, 86).* The man, who did all the talking, purchased a one-way ticket to New York for the woman, whose name he gave as Carmen Ortiz (86-87). He had a social security card in the name of Rinaldo and claimed that the woman, who had no identification, was his wife** (86, 88). After the man paid the fare in cash, the ticket agent placed the tags on the couple's suitcase, which the woman (whom the ticket agent tentatively identified as appellant) never touched (85, 87, 95-96).

At about 9:00 a.m. the suitcase was brought to the airline baggage service agent; the tag with the name Ortiz was still attached, but the destination tag with the flight number had fallen off (67-68). The airline personnel paged Carmen Ortiz

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*Numerals refer to the transcript of trial, dated April 6-7, 1977. "S" refers to the minutes of sentencing.

**The ticket agent thought that he might have explained that it was a Spanish custom for a married woman to keep her maiden name or that the woman's name might have been "Rinaldo-Ortiz" (96-97).

and when no one appeared the baggage agent opened the suitcase.* Inside, she found dirty clothes and, underneath these articles, two pouches, wrapped in silver electrician's tape. One of the pouches was ripped and the baggage agent poured out some brown granules with a vinegar odor (72-74). When none of the airline personnel could identify the substance, they contacted the Drug Enforcement Administration. A DEA agent conducted a field test, which revealed the contents of the pouches as heroin (76-78).

After determining the flight number and destination of the suitcase, the agent alerted the New York office and then replaced a sample of the narcotics and arranged to have the luggage forwarded to LaGuardia Airport (107,111). In New York, appellant Morales left the plane and reported her suitcase missing to a DEA agent posing as an American Airlines employee. She gave her name as "Carmen Ortiz" and listed her local contact address as that of "Lucille Ortiz," providing an address and phone number.** After the suitcase arrived, appellant picked it up, made some phone calls and was walking out of the terminal when the agents arrested her (112).

Appellant was taken to the DEA office at Kennedy Airport, where Agent Whitmore (who was in charge of the investigation)

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*The woman, in fact, did respond to her name being paged, but was directed to the boarding gate by a passenger service representative (89-90).

**The agents subsequently ascertained that the address and phone number were that of appellant's sister, Lucille Morales (150-151).

questioned her with the assistance of Philip Lawry, a Spanish speaking Customs Department employee who acted as interpreter (199-200). When the agents informed appellant of the serious charge against her, she appeared "upset" and asserted that she had not known that there were drugs in the suitcase (177, 231). She told the agents that a short, dark man named Juan or "El Chiquito," whom she had seen three or four times in the neighborhood, promised her $1,000 if she brought the suitcase to a man called "Shorty" in New York. Appellant had not been concerned with the contents of the case, which appeared to be apparel, and only opened it up to throw in a blouse to wear on the return flight (202-203). Juan told appellant to use the name of Ortiz on the flight and gave her $100 and the phone number to call upon arriving at LaGuardia. She had done so and told the agents the address at which she had been instructed to deliver the suitcase (131-132, 236).

Appellant informed the agents that they would have to act immediately to capture those involved in the crime and, following promises that the agents would bring her cooperation to the attention of the judge who would ultimately sentence her, appellant agreed to make a "controlled delivery" of the narcotics (133, 162, 172, 191).

The government agents followed appellant to 2230 Fulton Street, where a blonde woman (Anna Mendez) called to appellant from her window (134). A moment later Mendez went outside, took the suitcase and appellant followed her upstairs (134). Soon

after the two women went into a third floor apartment the agents appeared, with guns drawn, and requested permission to enter. They called appellant aside and, in response to their questions, she informed them that Mendez had said that she knew why appellant was there, that she had called "Shorty"* and that he would meet the two women in the apartment (136). Following statements by Mendez to the agents that Shorty had told her to expect the arrival of a blonde and her showing them various notations with Shorty's phone number (which appellant also possessed), the agents took both women back to their office (137-138, 119-120).

Appellant was questioned off and on until midnight (226). None of the information that appellant gave the agents was shown to be false (178). Nevertheless, the agents did not believe her inability to provide the name and address of her source (164, 175). Whitmore recalled that she had expressed concern for the safety of her babies and the agent had conceded that such worries were not baseless (170-172).

B. The Instruction

The court gave the following charge** on appellant's use of a false name in filing the airline baggage claim and on conscious avoidance of knowledge:

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*The DEA agents had promised appellant that if she helped them to catch "Shorty," they would do all they could to help her (211). "Shorty" (Eriberto Muniz) was arrested for the drug offense on March 5, 1977.

**The complete charge is C to the separate appendix to appellant's brief.

> There is evidence in this case, or at least the Government claims that there is evidence in this case, that the defendant participated in the fabrication of a document intended to mislead the investigative authorities. If you find beyond a reasonable doubt that this document was spurious or false, and if you find beyond a reasonable doubt that the defendant participated in the making of it, you may consider that fact as probative of the defendant's guilt.
>
> The fabrication of false documentary evidence has from the earliest time been treated as evidence of guilt. Similarly, if you find beyond a reasonable doubt that the defendant used a name other than her own in order to avoid subsequent identification, that would be a fact from which you may, but need not, if you do not wish to do so, infer a consciousness of guilt on her part.
>
> The fact of knowledge may be sustained by direct or circumstantial evidence, just as any other fact in the case. One may not willfully and intentionally remain ignorant of a fact important and material to her conduct, and thereby, escape punishment. The defendant's lack of knowledge is not available to the defendant, if the jury finds from all of the evidence beyond a reasonable doubt that the defendant had a conscious purpose to avoid enlightenment by closing her eyes to the facts which should have caused her to investigate.
>
> (300-301).

C. The Performance of Trial Counsel

During the pre-trial suppression hearing, counsel cross-examined Agent Whitmore about a telephone conversation the two had had. The attorney asked whether the agent recalled him asking if it was alright to tape record the conversation; the agent had no such recollection (H128-129).* After the testimony was

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*"H" refers to minutes of the hearing upon appellant's (and Mendez's) motions to suppress statements and physical evidence.

completed, the Assistant United States Attorney demanded that the defense attorney produce the tape or take the stand. The lawyer objected, reminding the court that the prosecutor (with Judge Platt's sanction) had denied the defense access to the Government 3500 material at that very hearing (H191, 85). Nevertheless, the court told counsel that he had "opened the door" and, though the attorney made clear that he would not introduce any tapes at trial, he was ordered to testify (H192). The prosecutor yelled at counsel (H194) and asked whether he was aware that he had violated the canons of ethics and the decisions of this Court as well as the New York State courts (H198).

On the following day just before the trial began, the defense attorney informed the court that this was his first federal trial; he had been unable to sleep the previous night and was "quite scared" because of the prosecutor's threat made the day before at the hearing to report him to the grievance committee (5-7, 10-11, H192). Moreover, counsel also advised the court that after the suppression hearing, while the attorney waited for the elevator with his client and her family, the prosecutor told him in "a loud, boisterous manner" that he did not know how to practice, that he was putting his client in jail and that the Government was going to obtain a superseding indictment. At that time, the prosecutor also promised that Judge Platt would give appellant

a lengthy sentence if convicted (7, 9). At no time during this colloquy, did the Assistant United States Attorney deny the truth of these accusations. The defense lawyer concluded by stating that "never has an attorney in a courtroom asked me to take the stand and I feel in a way, if I pursue this, I am going to look out for my interests too..." (11-12). At the conclusion of this statement and at the prompting of both the lawyer and prosecutor, the court asked appellant through an interpreter if she still had confidence in her attorney; she responded that she did (8, 12-13).*

At the same time as counsel expressed his fears arising from the prosecutor's tactics, he announced his admiration for the Assistant United States Attorney:

> ...Let me say this, with all due respects to my learned colleague, he is a very good attorney and he is very eloquent, and he does a tremendous job in the courtroom.
>
> (7).

He noted twice how much he had learned from the Assistant United States Attorney (7, S3).

When the trial began, with counsel's consent the proceeding became, in essence, one by stipulation -- Agents Whitmore and Lawry were the only witnesses. The suppression hearing testimony of two airline employees was read to the jury and the defense stipu-

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*The court also held a hearing, at which Agent Whitmore testified, to determine whether the defense attorney felt a need to testify at trial in regard to his telephone conversation with the Agent. The attorney decided that he would not have to take the stand (31-36).

lated to the testimony of two chemists, DEA Agent Lobosco (who field-tested the drugs at O'Hare Airport), and Agent Sharkey (who posed as an airline employee at the Lost Baggage office at La-Guardia).

The defense attorney did not object at trial when the prosecutor elicited from Agent Whitmore post-arrest statements by Anna Mendez (137). The same Assistant United States Attorney had previously moved for the severance of Mendez's case because of the Bruton v. California, 391 U.S. 123 (1968), problem (H4-5).* Counsel also failed to object when the court made disparaging remarks in front of the jury ("Maybe I am missing something here, Mr. Lieber, but if anything, it seems to me it hurts you" (171)) or when the prosecutor delivered a brief mid-trial summation:

> MR. LEVIN-EPSTEIN: Ladies and gentlemen, as indicated by Agent Whitmore's testimony, the two telephone numbers on either of these two slips of paper are identical; they are the number 435 1262, and you may recall precisely the same number that appeared on the document taken from Ms. Morales at the time of her arrest at the airport.
>
> Thank you Agent Whitmore, I have no further questions.
>
> (138-139).

On the other hand, when the prosecutor (who asked dozens of leading questions of his own witnesses (see, e.g., 205-211)),

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*On May 31, 1977, Judge Platt suppressed Mendez's statements as violative of her Fifth Amendment rights and additionally suppressed the items seized as the result of those statements. Both Mendez's statements as well as the physical evidence was introduced against appellant (137-138).

objected to counsel asking leading questions on cross-examination, the defense attorney apologized (159). The court had to tell him twice that this was permissible (159).

Counsel failed to object when the prosecutor told the jury in his opening statement that the street value of the narcotics made the case "an extremely important" one (43), or even when he referred in summation to "the sixty odd thousand dollars worth of contraband poison..." (260).

In response to the defense's pre-trial request for discovery of statements by the defendant under Rule 16, the prosecutor provided the following response on March 24, 1977:

> 16(a)(1)(A)
>
> On or about February 25, 1977, your client (after identifying herself as "Carmen Ortez") placed a claim with American Airlines for a piece of luggage she said was lost.
>
> After the suitcase was delivered and she took custody of it, she was arrested, advised of her rights and agreed to cooperate.
>
> She stated, in substance, that she was to receive $1,000 for bringing the suitcase to New York. She further stated, in substance, that she was told, on the telephone, to proceed to 2230 Fulton Street, Brooklyn, New York, with the bag. These instructions were given by Heriberto Muniz. She then agreed to cooperate in the controlled delivery to Anna Mendez.

At trial, the prosecution introduced statements made by appel-

lant Morales following the controlled delivery,* while she was still under arrest and when she did not receive Miranda warnings (135-136). Counsel did not object to the Government's failure to disclose this material until Agent Lawry testified on direct examination that Juan had given her the Ortiz name. At that point, counsel moved for a mistrial (212-213). The prosecutor announced:

> Your Honor, we gave him everything that he was entitled to according to the law. He wrote to us and I will be happy to produce that letter for the court's review.
>
> (213).

The court denied the motion, expressing the belief that under Rule 16, a defendant was only entitled to written statements in the possession of the Government (213-214).

The defense lawyer was under the misapprehension that, in order to convict, the jury had to find that appellant knew that the pouches in the suitcase contained heroin, rather than some other controlled substance. In summation he speculated that appellant may have believed that the brown granules were marijuana (273, 281). At the prosecutor's subsequent request, the court instructed the jury that the government did not have to

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*The prosecutor not only adduced evidence of appellant's statements through Agent Lawry (who spoke to her in Spanish) but through Agent Whitmore as well. Counsel's objection to Whitmore's double hearsay testimony was overruled (130). However, when the defense attorney sought to question the case agent about the incompleteness of Lawry's summary of appellant's statements, the prosecutor's objection was sustained (148-149).

prove knowledge of a specific narcotic (317, 313-315).

The jury returned from its deliberations with the question, "would the defendant be equally guilty of possession of any other narcotic as heroin; would marijuana be included?" (323). The court responded that the substance in the pouches was stipulated to be heroin by the parties and that "it wasn't necessary that the Government prove that she knew it was heroin as distinguished from some other narcotics" (325-326).

The jury returned shortly with a verdict of guilty (328). At sentencing, counsel moved to set aside the verdict on the ground that the court had erred in its charge regarding appellant's possible belief that she was carrying marijuana (S3-4).

D. The Sentencing

As counsel argued and the presentence report (hereinafter, "report") states, appellant Morales is the 26 year old unmarried mother of three children, the oldest of whom is 12 years old. She completed four grades of elementary school and possesses "a low average intelligence" (report, at 15). Appellant speaks only Spanish and migrated to Chicago with her children (who currently reside with her) four months before her arrest, which was her first conflict with the law. She had resided in New York City for the ten year period previous to that and was a welfare recipient in both cities (report, at 15).

When counsel stated that appellant's cooperation had led to the arrest of Anna Mendez and "Shorty" (whom the presentence

report cites as the "middle person" and intended recipient of the heroin, respectively), the court responded, "I don't think that the extent of her cooperation fits the Government's definition of cooperation fully..." (S7). Judge Platt said that appellant had refused to testify at further proceedings -- "that there has been a complete withdrawal into a shell since the initial tender of cooperation" (S7-8). The court rejected the claim that appellant might be frightened of possible danger to her children (S8). Despite appellant's close-knit, law-abiding family and the friends who appeared in her behalf in court (but were not permitted to speak), Judge Platt sentenced appellant to a prison term of 12 years, specifying that under 18 U.S.C. §4205(b)(2), she may become eligible for parole at such time as the Parole Commission may determine. The court also imposed a Special Parole term of 10 years.

ARGUMENT

POINT I

APPELLANT WAS DEPRIVED OF A FAIR TRIAL BY THE COURT'S ERRONEOUS INSTRUCTIONS ON CONSCIOUS AVOIDANCE OF KNOWLEDGE AND ON THE FABRICATION OF A FALSE DOCUMENT.

The sole issue raised by the defense at trial was whether appellant Morales knew that the suitcase she transported to New York contained narcotics. In the crucial portions of the charge dealing with appellant's use of a false name in filling out the lost baggage form and in its instruction on conscious avoidance of knowledge, the court committed prejudicial error.

A.

The court gave the following charge in regard to appellant's alleged fabrication of a false document:

> There is evidence in this case, or at least the Government claims that there is evidence in this case, that the defendant participated in the fabrication of a document intended to mislead the investigative authorities. If you find beyond a reasonable doubt that this document was spurious or false, and if you find beyond a reasonable doubt that the defendant participated in the making of it, you may consider that fact as probative of the defendant's guilt.
>
> The fabrication of false documentary evidence has from the earliest time been treated as evidence of guilt. Similarly, if you find beyond a reasonable doubt that the defendant used a name other than her own in order to avoid subsequent identifi-

> cation, that would be a fact from which you may, but need not, if you do not wish to do so, infer a consciousness of guilt on her part.
>
> (300-301).

The proposition, which is twice stated by the court, that the fabrication of false documentary evidence is evidence of guilt is incorrect. In the recent case of United States v. DiStefano, 555 F.2d 1094, 1104 (2d Cir. 1977), this Court found plain error in a charge that false exculpatory statements are "circumstantial evidence of the defendant's guilt." The use of a false document, like a false exculpatory statement, is "evidence of consciousness of guilt." United States v. DiStefano, id.; United States v. Johnson, 513 F.2d 819, 824 (2d Cir. 1975). Since the falsehood involved in the instant case was not even used in response to questioning by law enforcement authorities (cf. United States v. Johnson, id.), but was used solely in dealing with an airline, it has less probative value than a false exculpatory statement.*

As in DiStefano, supra, a proper instruction was especially crucial because of the emphasis laid upon the evidence by the prosecutor in his summation, in which he also argued that both fabrication of a false document and use of a false name are

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*The error was not cured by the court's correct charge on use of a false name. The latter instruction begins with the word "similarly," indicating a distinction between the evidentiary weight to be accorded a fabrication of a false document and use of a false name.

evidence of guilt. The prosecutor stressed:

> ...the clear evidence in this case that was brought out by me and the Government, and for that matter even Mr. Lieber that even the name on the document was a false name. I submit to you there may be a charge on this, I mean, I don't know what the Court is going to charge, but there may be a charge that if you find as a matter of course in the trial that the defendant was responsible for the creation of a false or misleading document in the course of this transaction, that is evidence of guilt and that is evidence which you can consider in convicting her of the crime charged. Not to mention the fact that the use of a false name is evidence of guilt, and common sense people don't use illegal aliases unless they don't want other people to know their true names. That's why it's called an alias, also known as, and you may have heard that expression. In fact, we might even have to issue another indictment in this case and draft it to read Caledonia Morales, also known as Carmen Ortiz, also known as Carmen Ortiz, false name.
>
> I say to you, that in and of itself, that is enough for you to find the entire business, this entire story incredible, that she didn't have knowledge.

(257-258); emphasis added.

Such remarks highlight the necessity for an adequate instruction in this case.

B.

The court gave the following instruction on conscious avoidance:

> The fact of knowledge may be sustained by direct or circumstantial evidence, just as any other fact in the case. One may not

> willfully and intentionally remain ignorant of a fact important and material to her conduct, and thereby, escape punishment. The defendant's lack of knowledge is not available to the defendant, if the jury finds from all of the evidence beyond a reasonable doubt that the defendant had a conscious purpose to avoid enlightenment by closing her eyes to the facts which should have caused her to investigate.
>
> (301).

This charge was erroneous because it was not balanced by an instruction that if appellant actually believed that there were no drugs in the suitcase, then the jury must acquit. United States v. Esquez-Gomez, 550 F.2d 1231, 1236 (9th Cir. 1977); United States v. Bright, 517 F.2d 584, 588 (2d Cir. 1975). As this Court noted in Bright, supra at 587:

> The juror's difficult task of probing the mind and will of another person is hard enough with the aid of a charge that balances the countervailing considerations. His verdict becomes suspect when he has not had the benefit of a balanced instruction from the court.

In a close case in which knowledge was the disputed issue, the errors in the court's charge must be deemed sufficiently prejudicial to constitute "plain error." See United States v. DiStefano, supra, at 1104. Though a court's failure to deliver a balanced charge on conscious avoidance of knowledge has not been deemed plainly erroneous (United States v. Dozier, 522 F.2d 224, 228 (2d Cir. 1975)), when combined with an improper instruction on fabrication of a false document (which has been deemed reversible error without an objection (United States v. DiStefano, supra)), a new trial should be ordered.*

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*Counsel's failure to object to these improper instructions on the crucial issue in the case is symptomatic of his ineffective performance throughout. See Point II, infra.

POINT II

AS A RESULT OF THE DEFENSE ATTORNEY's CONFLICT OF INTEREST AND HIS IGNORANCE OF THE FEDERAL CRIMINAL LAW, APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

This trial is marked by its unique combination of a young trial attorney with an extraordinary ignorance of federal criminal law, an Assistant United States Attorney whose conduct created a conflict in the defense attorney between his need to pursue his own self-interest and his obligation to represent his client, and a district judge who not only failed to curb, but actually encouraged, the prosecution's outrageous misconduct. Under these circumstances, appellant was deprived of the effective assistance of counsel.

A. Conflict of Interest

After refusing to grant the defense access to prior statements of the Government's witnesses at the suppression hearing, the prosecutor had the temerity to demand the defense attorney to take the stand to reveal the statements Agent Whitmore had made to him in a telephone conversation.* The prosecutor not only forced the attorney to take the stand, yelled at him, accused him of breaching the rules of ethics, and threatened to report him to the grievance committee, but abused him fur-

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*The prosecutor's aim was clearly to gain a psychological advantage. If his only concern had been that counsel had asked a question in bad faith, he need only have objected to the question and asked for an offer of proof.

ther outside the courtroom in the presence of his client. As counsel informed the court on the next day -- the morning of his first federal trial -- this experience had left him shaken. He admitted that he was "quite scared" and expressed a need "to look out for [his] own interests too..." (11-12).

The court not only failed to restrain the prosecutor's abusive behavior, but sanctioned his excesses. The court refused to order the Government to grant the defense access to 3500 material at the suppression hearing, but required the defense attorney to produce the tape in question or take the stand as a witness.*

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*Again, at trial, the court permitted the prosecutor to elicit double hearsay testimony from Agent Whitmore concerning appellant's statements in Spanish, but cut off the defense from cross-examining the agent about the completeness of the report concerning these statements (130, 148-149). Thus, the concerted effort of court and prosecutor doubtless communicated to counsel the futility of any efforts in appellant's defense.

B. Ineffective Assistance of Counsel

The conflict of interest between the attorney's obligation to defend his client and his fear of offending the prosecutor (who had threatened to report him to the grievance committee) is evident through his failure to object to flagrantly improper evidence or misconduct by the Assistant United States Attorney, by his willingness to stipulate to the testimony of most of the Government's witnesses, and by his obsequious remarks toward the prosecutor. The situation was exacerbated by counsel's ignorance of federal criminal law, which led him to construct an illusory defense.

To pacify the Assistant United States Attorney, counsel not only praised the talents of the prosecutor, but became so apologetic of his own efforts that he said he was sorry for asking leading questions on cross-examination. Counsel conspicuously failed to object to the prosecutor's reference in summation to "the sixty odd thousand dollars worth of contraband poison" (260) or to his impromptu mid-trial speech to the jury (138-139). Counsel similarly failed to object to the court's disparagement of his line of questioning in the presence of the jury.

No doubt aware of his opponent's virtual capitulation, the prosecutor introduced evidence he knew was inadmissible. Thus, proof of Anna Mendez's post-arrest statement was adduced in violation of appellant's right of confrontation by the Assistant United States Attorney who had previously moved for a severance of Mendez's case because of the possible Bruton

problem. The error is made worse by the fact that Mendez's statement has been ordered suppressed by the district court so that it cannot even be admitted against the declarant. Further, though counsel eventually moved for a mistrial on the valid ground that the Government had introduced a statement by appellant which had not been disclosed as required by Rule 16,* he did so only after other statements had been admitted in violation of the rule. If counsel had acted promptly in demanding compliance with Rule 16 as soon as the Government's dereliction had become evident, he might have been able to prevent the introduction into evidence of the damaging admission through Agent Lawry (212-213) or, at least, would not have been taken unawares by it.

The most serious failing of the defense attorney, and the one that directly resulted in a verdict of guilty, was his misapprehension that a belief on appellant's part that the pouches contained marijuana would have constituted a defense to the charge of possession of heroin with intent to distribute. Based upon the evidence, counsel could have reasonably argued that appellant did not know what was underneath the clothes in the suitcase or might have thought that she was transporting jewelry or a similar kind of contraband. Counsel proceeded to ignore the statements that appellant had made to the DEA agents that she had not looked beneath the clothing, and speculated that

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*The court erred in contending that Rule 16(a)(1)(A) applies only to written statements, for the statute explicitly applies to oral statements of a defendant as well.

she might have seen the contents of the pouches and thought that the brown granules were marijuana. This argument had such a profound impact upon the jurors that they returned from their deliberations with a question as to whether appellant would be equally guilty if she possessed marijuana. The court (at the prosecutor's request) charged, in accordance with the holding of United States v. Davis, 501 F.2d 1344 (9th Cir. 1974), and other cases, that appellant would be equally guilty if she believed the substance she transported was marijuana. Soon afterward, the jury returned with a verdict of guilty. Thus, because of his ignorance of the law, the defense lawyer took a position that had to result in a conviction. In essence, he argued to the jury that his client was guilty. For counsel to be ignorant of the law regarding the key issue in the case is to provide "woefully inadequate" representation. Saltys v. Adams, 465 F.2d 1023, 1029 (2d Cir. 1972); United States v. Currier, 405 F.2d 1039, 1043 (2d Cir.), cert. denied, 395 U.S. 914 (1969). By creating a hopeless theory that not only ignored the facts but was based upon a misapprehension of the law, counsel made this case a sham and a mockery.

Though the court was made aware before trial began that counsel was confused and felt a need to pursue his own interest rather than that of his client, Judge Platt failed to conduct a proper inquiry to determine whether appellant Morales understood the potential conflict. See United States v. Car-

rigan, 543 F.2d 1053 (2d Cir. 1976); United States v. Mari, 526 F.2d 117, 119 (2d Cir. 1975). The court merely asked whether appellant wanted her lawyer to continue to represent her. Judge Platt, merely referring to the colloquy, did not explain the reason for the inquiry to appellant, who spoke no English and proceeded through trial with an interpreter. Indeed, the judge acknowledged that appellant probably had difficulty understanding the colloquy that had transpired between her attorney and the court (12-13). Appellant was clearly prejudiced by her attorney's failure to object to improper evidence as well as his construction of a false defense because of his ignorance of the applicable law. Thus, appellant was deprived of her Sixth Amendment right to effective assistance of counsel.

POINT III

THE IMPOSITION OF A HARSH TWELVE YEAR TERM OF INCARCERATION PLUS A SPECIAL PAROLE TERM OF TEN YEARS WAS BASED UPON MATERIAL FALSE ASSUMPTIONS CONCERNING APPELLANT.

For the crime of acting as a "mule" on one occasion, the court sentenced appellant, a first offender with three young children and a fourth grade education, to a twelve year term of imprisonment* plus a special parole term of ten years. The court imposed this severe sentence by refusing to consider her significant cooperation with the authorities following her arrest. Since the sentence was based upon "false assumptions concerning the defendant" (United States v. Robin, 545 F.2d 775, 779 (2d Cir. 1976)), the sentence should be vacated.

At sentencing, the court flatly refused to consider the assistance appellant had rendered the authorities in the arrests of Anna Mendez and "Shorty" Muniz. That Judge Platt had proceeded under a misapprehension as to this material information bearing on sentencing is revealed by his statement "that there has been a complete withdrawal into a shell since the initial tender of cooperation" (S7-8)(emphasis added). Appellant did not merely offer to cooperate, she in fact did so at great risk of personal injury. The case agent testified at trial that

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*Ironically, this is the age of the 26 year old appellant's oldest child.

appellant had told him that he must act immediately to apprehend the persons involved in the crime. She then went to the address under the surveillance of the agents and made the controlled delivery, providing further information at the time of Anna Mendez's arrest. The record is replete with evidence of promises by the agents that if appellant went through with this delivery they would bring her cooperation to the attention of the United States Attorney* and the sentencing judge (162, 172, 190, 191). In Agent Whitmore's own words as to appellant's cooperation in making the controlled delivery, "Certainly the Judge will be made aware of her cooperation. I'm not making that a secret" (190). Thus, appellant did exactly what she was asked to do and fulfilled the assurances she gave to the agents.

The court's statement that appellant only "tendered" cooperation reveals a misunderstanding of appellant's actual cooperation with the authorities, which resulted in the arrest of the middle person in the narcotics transaction as well as the intended recipient of the heroin. Clearly, appellant not only had the right to present all available information bearing on her cooperation with the authorities fully and accurately, but

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*The sentencing judge, in fact, asked the prosecutor to correct him if he was wrong in concluding that appellant's actions did not fit "the Government's definition of cooperation fully ...." For once, the Assistant U.S. Attorney remained silent (S.7).

"the court had a duty to listen and to give such information serious consideration."* United States v. Malcolm, 432 F.2d 809, 817 (2d Cir. 1970). The court's material false assumptions concerning appellant rendered "the entire sentencing procedure invalid as a violation of due process." Townsend v. Burke, 334 U.S. 736, 740-741 (1948); United States v. Stein, 544 F.2d 96, 102 (2d Cir. 1976); United States v. Robin, supra, 545 F.2d at 799; United States v. Malcolm, supra, 432 F.2d at 816.

Not only did the court pay no heed to the facts related by defense counsel, but it refused to allow persons familiar with appellant's character and family background to speak on her behalf (S9). See United States v. Needles, 472 F.2d 652, 658 (2d Cir. 1973). Because of the "recognized difficulty which an original sentencing judge may have in rejecting or modifying prior conclusions and the necessity of maintaining the appearance of justice" (United States v. Stein, supra, 544 F.2d at 104), the sentence should be vacated and a sentencing should be conducted by a different judge.

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*If appellant's cooperation has not been permanent, it should be noted that appellant had mentioned her concern for the safety of her young children on the date of her arrest. Moreover, Agent Whitmore took a more realistic view of the dangers to which she and her family would be exposed than the court did (172, 170-171).

The pre-sentence report raises the question as to whether appellant's vagueness of recall is feigned or symptomatic of other mental problems. She suffered head injuries in a 1967 automobile accident, which left her with chronic headaches and faulty vision. She has also had numerous hallucinations (report at 12-14).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the matter remanded for a new trial; alternatively, appellant should be re-sentenced before a different judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

September 12, 1977

I hereby certify that a CORRECTED copy of this brief [redacted] has been mailed to the United States Attorney for the Eastern District of New York.

Barry Bassis